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No. _

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

LOIS CHAPMAN,

Petitioner,

—vs.—

ANTHONY CARDARELLI, THE HONORABLE WILLIAM PIKE, WILLIAM J. BROWN, ATTORNEY GENERAL OF OHIO,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a writ of habeas corpus should issue because, in a criminal trial for violation of a municipal ordinance prohibiting the distribution and sale of obscene material, the prosecution's failure to offer expert testimony or other evidence, apart from introduction of the materials themselves, to prove the essential element of the materials' appeal to the prurient interest of the members of the sexually deviant group to which the materials were directed, violated the First and Fourteenth Amendments to the United States Constitution?

2. Whether a writ of habeas corpus should issue because Sections 76.1 and 76.11 of the codified ordinances of the City of Tallmadge, Ohio, which attach criminal penalties for the distribution and sale of obscene materials, are

unconstitutionally vague and overbroad in violation of the First and Fourteenth Amendments to the United States Constitution?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED.....	- i -
TABLE OF AUTHORITIES.....	- vii -
OPINIONS BELOW.....	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	3
STATEMENT OF THE CASE.....	3
REASONS FOR GRANTING THE WRIT.....	11
ARGUMENT	
I. AN IMPORTANT QUESTION IS PRESENTED AS TO WHICH THE LOWER COURTS ARE IN CONFLICT, INVOLVING FIRST AMENDMENT AND DUE PROCESS RIGHTS, CONCERNING THE NEED FOR EXPERT TESTIMONY IN AN OBSCENITY PROSECUTION WHERE THE MATERIALS IN QUESTION ARE DIRECTED TOWARD SEXUALLY DEVIANT GROUPS.....	12
II. AN IMPORTANT QUESTION IS PRESENTED AS TO WHETHER THE CRIMINAL OBSCENITY ORDINANCES OF THE CITY OF TALLMADGE, OHIO, ARE	

TABLE OF CONTENTS (CONT.)

	Page
UNCONSTITUTIONAL UNDER THE FIRST AND FOURTEENTH AMENDMENTS BECAUSE OF OVERBREADTH AND VAGUENESS.....	25
A. The Overbreadth And Vagueness Of The Tallmadge Obscenity Ordinance As Written.....	25
B. The Overbreadth And Vagueness Of The Tallmadge City Ordinance As Judicially Construed.....	32
CONCLUSION.....	41
APPENDIX	
Sixth Circuit Court Order Affirming the District Court Judgment...	42
District Court Order Certificate of Probable Cause.....	45
District Court Memorandum and Order.....	46
Report and Recommendation of the Magistrate..	65
Denial of Writ of Certiorari.....	83
Supreme Court of Ohio Journal Entry Dismissing Appeal.....	84

TABLE OF CONTENTS (CONT.)

	Page
Ohio Court of Appeals Decision and Journal Entry.....	86
Municipal Court of Cuyahoga Falls Opinion...	102
Sixth Circuit Court Order Denying Rehearing..	116
Sixth Circuit Court Order Staying Mandate....	118
Petition for Writ of Habeas Corpus.....	120
Summons, 78 CRB 1144.....	133
Complaint, 78 CRB 1144.....	136
Summons, 78 CRB 1145.....	138
Complaint, 78 CRB 1145.....	141
First Amendment to the U.S. Constitution.....	143
Fourteenth Amendment to the U.S. Constitution....	144
Title 28, Section 2241.....	145
Title 28, Section 2253.....	148
Title 28, Section 2254.....	149
Tallmadge City Code of Ordinances, Section 76.1.....	155

TABLE OF CONTENTS (CONT.)

	Page
Tallmadge City Code of Ordinances, Section 76.11.....	158
Ohio Revised Code, Section 2907.01.....	161
Ohio Revised Code, Section 2907.32.....	167

TABLE OF AUTHORITIES

Cases	Page
Connecticut v. Magee, 32 Conn. Supp. 639, 353 A.2d 184 (1975)	21
Dunn v. Maryland St. Bd. of Censors, 240 Md. 249, 213 A.2d 751 (1965)	22
Ginzburg v. United States, 383 U.S. 463 (1966)	12
Hamling v. United States, 418 U.S. 87 (1974)	17
Kaplan v. California, 413 U.S. 115 (1973)	12
Miller v. California, 413 U.S. 15 (1973)	passim
Mishkin v. New York, 383 U.S. 502 (1966)	9,13
New York v. G.I. Distributors, 20 N.Y. 2d 104, 228 N.E. 2d 787 (1967)	22
Olsen v. Doerfler, 14 Mich. App. 425, 165 N.W. 2d 648 (1968)	22
Paris Adult Theatre v. Slaton, 413 U.S. 49 (1973)	12,13, 18,21
Pinkus v. United States, 551 F. 2d 1155 (9th Cir. 1978)	17

TABLE OF AUTHORITIES (CONT.)

	Page
Pinkus v. United States, 436 U.S. 293 (1978).....	13,17
Roth v. United States, 345 U.S. 476 (1973).....	13
Sovereign News Co. v. Falke, 448 F. Supp. 306 (N.D. Ohio 1977), remanded, 610 F. 2d 428 (6th Cir. 1979), cert. denied, 447 U.S. 923 (1980), opinion on remand issued Sept. 19, 1980 (N.D. Ohio), reversed, 674 F. 2d 484 (6th Cir. 1982).....	30,31,33, 34,36
State v. Burgun, 56 Ohio St. 2d 554 (1978).....	30,31,32, 33,36
State v. Childs, 447 P.2d 304 (Oregon, 1968)(en banc).....	22
State ex rel. Keating v. Vixen, 35 Ohio St. 2d 215 (1973).....	36
Turoso v. The Cleveland Municipal Court, 674 F.2d 486 (6th Cir. 1982)....	10,31, 37,40
United States v. Hill, 500 F.2d 733 (5th Cir. 1974), cert. denied, 420 U.S. 952 (1975).....	22

TABLE OF AUTHORITIES (CONT.)

	Page
United States v. Klaw, 350 F.2d 155 (2nd Cir. 1965)....	20
United States v. Palladino, 490 F.2d 499 (1st Cir. 1974), on remand, 413 U.S. 916.....	22
Ward v. Illinois, 431 U.S. 767 (1977).....	34,35,39
Wisconsin v. Simpson, 56 Wis. 2d 27, 201 N.W. 2d 558 (1972).....	22
Constitutional Provisions	
First Amendment to the United States Constitution..	3,7,8,11, 12,13,25
Fourteenth Amendment to the United States Constitution..	3,7,8, 20,25
Statutory Provisions	
Title 28, Section 1254(1).....	3
2241.....	3,9
2253.....	3
2254.....	3,9
Ohio Revised Code, Section 2907.01.....	26,30,31, 32,37
2907.32.....	26,30

TABLE OF AUTHORITIES (CONT.)

Page

Ordinances

Tallmadge City Code of Ordinances, Section 76.1..... passim
76.11.... passim

Other Sources

Brigman, William E., The Controversial Role of the Expert in Obscenity Litigation, 7 Cap. U. L. Rev. 519 (1978)..... 22

Caprio, Variations in Sexual Behavior..... 14

Krafft-Ebing, Psychopathia Sexualis..... 14

IN THE
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LOIS CHAPMAN
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-vs-

ANTHONY CARDARELLI, THE HONORABLE WILLIAM PIKE, WILLIAM J. BROWN, ATTORNEY GENERAL OF OHIO
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Lois Chapman, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The unreported opinion of the United States Court of Appeals for the Sixth

Circuit is set forth in the Appendix at pp. 42-44. The unreported opinion of the United States District Court for the Northern District of Ohio, Eastern Division is set forth in the Appendix at pp. 46-64. The unreported report of the United States Magistrate is set forth in the Appendix at pp. 65-83. The unreported order of the Ohio Supreme Court is set forth in the Appendix at pp. 84-85. The unreported opinion of the Ohio Court of Appeals, Ninth Appellate District, is set forth in the Appendix at pp. 86-101.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Sixth Circuit were filed on March 4, 1982. The Court of Appeals denied the petitioner's application for rehearing on April 16, 1982. This petition seeks review of the judgment of a United States Court of Appeals in a civil case. This

Court has jurisdiction to grant this petition under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First and Fourteenth Amendments to the Constitution of the United States are set forth in the Appendix at pp. 143-144. Title 28, Section 2241, 2253 and 2254 of the United States Code are set forth in the Appendix at pp. 145-154 Tallmadge City Code of Ordinances Sections 76.1 and 76.11 are set forth in the Appendix at pp. 155-160.

STATEMENT OF THE CASE

This petition seeks review of the judgment entered by the United States Court of Appeals which affirmed the decision of the United States District Court for the Northern District of Ohio, denying petitioner's petition for a writ of habeas corpus. Petitioner instituted habeas corpus proceedings to challenge her conviction and sentence under the Tallmadge

ordinances prohibiting the dissemination of obscene materials.

On November 30, 1978, petitioner Lois Chapman was convicted of pandering obscenity under Tallmadge City Ordinances §§76.1 and 76.11 in the Municipal Court of Cuyahoga Falls, Ohio. The prosecution introduced four magazines as its sole evidence to obtain a conviction against Mrs. Chapman. The four magazines, "Peek Show" (State Exhibit A), "Wet Dreams" (State Exhibit B), "Smut" (State Exhibit C), and "Hung Cadets" (State Exhibit D), each depicted bizarre and deviant activities, quite obviously focused at sexually deviant groups. "Peek Show" contained explicit photographs of male homosexual activity including masturbation, fellatio, and anal sodomy. The photographs placed an emphasis on the genitals of the completely nude men while they engaged in homosexual activity. "Wet Dreams" was directed to lesbian-scatological interests and enema fetishes.

The magazine was comprised of one picture after another of women urinating--sometimes on one another, and at other times, by themselves, while another woman looked on in obvious voyeuristic interest. Also included in "Wet Dreams" was a series of pictures depicting groups of nude women and occasionally a naked man, administering enemas to one another. Another picture showed a nude woman squirting milk from her breasts on another woman. The third magazine, "Smut," contained a series of photographs depicting bondage and sado-masochistic activities. The magazine, in a two-page spread, included a series of photographs of men's and women's breasts with nipples pierced by hat pins and earrings. In one instance, the nipple was pierced by six or seven earrings. In another photograph, a naked woman was shown hanging by her hands with her wrists bound by leather belts. Attached to the nipples

of her breasts were two vises, tightly closed, from which chains were suspended with weights on the ends. The final piece of evidence introduced by the prosecution in support of its case was a magazine entitled "Hung Cadets." Like "Peek Show," "Hung Cadets" featured male homosexual activity including acts of masturbation, fellatio, and anal sodomy performed by totally nude men upon other nude men. As in all of the magazines, the photographs particularly focused on the models' genital areas.

After presentation of all the evidence and arguments of counsel, the trial judge instructed the jury that it was to determine whether the material was obscene when "judged with reference to ordinary adults, or, if it is designed for sexual deviates or other specially susceptible group, judged with reference to such group...." Solely on the basis of the four magazines

described above, the jury returned a conviction against Lois Chapman for pandering obscenity. The petitioner was fined a total of Two Thousand Dollars ($2,000.00) and sentenced, on two counts, to thirty (30) days confinement in county jail, to run concurrently. The sentence was stayed, and petitioner remained free on bond, pending appeal to the Ohio Court of Appeals and the Supreme Court of Ohio.

At trial, petitioner raised timely objections that the ordinances under which she was charged were unconstitutional under the First and Fourteenth Amendments due to overbreadth and vagueness, and that the failure of the prosecution to produce expert testimony regarding the materials depicting deviant sexual behavior constituted a denial of her right to due process.

Petitioner appealed her conviction to the Court of Appeals of Ohio, Ninth Appellate District. She renewed her attack

on the constitutionality of Tallmadge's obscenity ordinances under the First and Fourteenth Amendments and reasserted her claim that she had been denied due process of law by the prosecution's failure to present expert witness testimony concerning the prurient appeal of the allegedly obscene materials to deviant sexual groups. The court of appeals rejected petitioner's claims (App. 86). She then appealed to the Ohio Supreme Court where she advanced the same constitutional claims. The Supreme Court of Ohio dismissed the petitioner's appeal for want of substantial constitutional question (App. 84). Subsequently, petitioner filed a petition for writ of certiorari in the United States Supreme Court, and the petition was denied (App. 83).

On June 12, 1980, petitioner Lois Chapman filed a petition for writ of habeas corpus in the United States District

Court for the Northern District of Ohio, pursuant to 28 U.S.C. §§2241 and 2254, to challenge her conviction and sentence on the basis of the unconstitutionality of the Tallmadge City Ordinances and the denial of due process of law (App. 120).

The district court denied habeas relief to petitioner, finding the Tallmadge City Ordinances to be constitutional and the due process requirements to have been met (App. 46). The district court adopted the conclusion of the magistrate that "the record does not demonstrate, nor has the petitioner shown, that the materials which were [the] gravamen of petitioner's conviction were intended for such a bizarre deviant group that experience of the trier of fact would be plainly inadequate to judge whether the material appealed to the prurient interest as required by Mishkin v. New York, 383 U.S. 502 (1966)" (App. 56-57).

Petitioner then appealed the denial of the writ to the Court of Appeals for the Sixth Circuit. The Court of Appeals explained:

> Because the Tallmadge obscenity ordinances [sic] mirrors almost identically the Ohio state obscenity statute, we have held this case until the constitutionality of that statute could be decided by another panel of this court.

(App. 43). The other panel of the court found the Ohio obscenity law constitutional in Turoso v. Cleveland Municipal Court, 674 F.2d 486 (6th Cir. 1982). In accordance with this decision, the court found that the Tallmadge obscenity ordinance was also constitutional. Moreover, the court affirmed the district court's finding that petitioner was not denied due process of law in the court below. A petition for rehearing was denied on April 16, 1982. On May 4, 1982, the Court of Appeals ordered a stay of mandate until final disposition of the case by this Court.

The petitioner now seeks review by this Court of the decision rendered by the Sixth Circuit Court of Appeals.

REASONS FOR GRANTING THE WRIT

The issues raised by this petition strike at the very heart of the constitutional guarantee to free and untrammeled expression. Petitioner seeks clarification of two issues: Whether expert testimony is necessary to determine if the allegedly obscene material appeals to the prurient interest of a sexually deviant group when the materials introduced into evidence are directed to such deviant group? And, Whether or not the City of Tallmadge, Ohio, makes it a crime, under its obscenity law, to publish literature which is protected by the First Amendment and whether or not the City of Tallmadge has given clear and specific notice of what ideas its citizens may express without fear of

criminal prosecution under that Law? These questions raise important concerns which are in need of clarification and resolution by this Court

ARGUMENT

I. AN IMPORTANT QUESTION IS PRESENTED, AS TO WHICH THE LOWER COURTS ARE IN CONFLICT, INVOLVING FIRST AMENDMENT AND DUE PROCESS RIGHTS, CONCERNING THE NEED FOR EXPERT TESTIMONY IN AN OBSCENITY PROSECUTION WHERE THE MATERIALS IN QUESTION ARE DIRECTED TOWARD SEXUALLY DEVIANT GROUPS.

This case raises important First Amendment and due process questions regarding the nature of proof in obscenity prosecutions where the materials at issue depict sexually deviant activities and are directed to sexually deviant groups. This Court has in several cases clarified the need and use of expert or other evidence where the materials at issue were directed to an average adult population. Paris Adult Theatre v. Slaton, 413 U.S. 49 (1973); Kaplan v. California, 413 U.S. 115 (1975); Ginzburg v. United States, 383

U.S. 463 (1966). An important question remains unanswered, however, regarding the need and use of expert or other supporting testimony in obscenity prosecutions where the materials depict sexually deviant activities and are directed at sexually deviant groups. Paris Adult Theatre v. Slaton, 413 U.S. 49, 56, n. 6 (1973); Pinkus v. United States, 436 U.S. 293, 302 (1978).

This Court has stated that one of the basic elements for determining the obscenity vel non of a work is "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." Roth v. United States, 345 U.S. 476, 489 (1957); Miller v. California, 413 U.S. 15 (1973).

In Mishkin v. New York, 383 U.S. 502, 508 (1966), this Court determined that a work need not appeal to the prurient interest of an average community member,

but rather could be found obscene if it appealed to the prurient interest of an "average member" of a sexually deviant group. Thus, Mishkin resolved the anomaly that the more bizarre and deviant the materials--the less likely they would be found to appeal to the average person's prurient interest and therefore, the less likely they would be found to be obscene. However, Mishkin left unresolved the amount of proof required to show that a work appeals to the prurient interest of a deviant group.[1/]

1/ This question did not arise in Mishkin because, as the Court summarized the evidence:

"The evidence fully establishes that these books were specifically conceived and marketed for such groups. Appellant instructed his authors and artists to prepare the books expressly to induce their purchase by persons who would probably be sexually stimulated by them. It was for this reason that appellant 'wanted an emphasis on beatings and fetishism and clothing - irregular clothing, and that sort of thing, and again sex scenes between women; always sex scenes had to be very strong.' And to be certain that authors fulfilled his purpose, appellant furnished them with such source materials as Caprio, Variations in Sexual Behavior, and Krafft-Ebing, Psychopathia Sexualis." 383 U.S. at 509-510.

In the case at bar, the prosecution sought criminal convictions for the exhibition and sale of four magazines which it urged were obscene. At trial, the only evidence introduced by the prosecution to prove the element of prurient appeal were copies of the four magazines: State Exhibit A, entitled "Peek Show," was directed to a homosexual audience and consisted solely of photographs focusing on the genitals of totally nude males. The photographs depicted the males, singly and in groups, engaged in masturbation, fellatio, anal sodomy and other homosexual activity. State Exhibit B, entitled "Wet Dreams," focused on lesbian-scatological activity and enema fetishes. The entire magazine consisted of photographs of completely nude females, some of whom were urinating, some of whom were observing, while still others were being urinated upon, and photographs of women and occasionally a naked man,

administering and/or receiving enemas. Every photograph emphasized the bizarre nature of the activity and focused on the genitals of the nude models. State Exhibit C, entitled "Smut," contained depictions of bondage and sado-masochistic activities including two pages of photographs of women's breasts with pins and earrings piercing the nipples. Lastly, State Exhibit D, entitled "Hung Cadets," was devoted exclusively to photographs of nude males in a variety of poses showing masturbation, fellatio, anal sodomy and other homosexual activity. As in all of the other exhibits, the photographs focused on the models' genitals.

No testimony, whatsoever, was introduced on the issue of whether the materials appealed to the prurient interest of a sexually deviant group. Nevertheless, the trial court instructed the jury that it could in fact determine the obscenity or

non-obscenity of the materials with reference to a sexually deviant group.

Although this Court has stated that "[a] juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes..." Hamling v. United States, 418 U.S. 87, 104 (1974),[2/] it has also recognized that in extreme cases such as this where the materials are directed not to an average member of the adult community, but to a sexually deviant group, the experience of the jurors might be inadequate to

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2/ It is important to note that in both Hamling and Pinkus v. United States, 436 U.S. 293 (1973), see 551 F.2d 1155, 1158-1159, n. 7, two decisions which, in part, addressed the jury's capability of determining obscenity, expert testimony was introduced by the prosecution in support of its charge that the material in question appealed to the prurient interst of the deviant group.

judge whether the material appealed to the deviant group in question. Paris Adult Theatre v. Slaton, 413 U.S. 49, 56, n. 6 (1973). For, where the jury might be completely capable of evaluating whether a work appealed to the prurient interest of an average community member, based on his or her typical experience, the average juror does not have sufficient knowledge to assess whether a work is sexually stimulating to an average member of a sexually deviant group. Clearly, a juror can determine that the materials in question are totally disgusting, but the prurient interest prong of the test focuses on the erotic, not the emetic.

In essence, the practice of the court below collapses the Miller test into a two-prong, rather than three-prong

test. By not requiring an expert appraisal on whether a bizarre work, focused at a sexually deviant group, appeals to the prurient interest of that group, the court allows the jury to return a conviction of obscenity on the basis that the work depicts sexual activity, that it lacks literary, artistic, political or scientific value and on the uninformed conjecture that the work appeals to the prurient interest of a group with whom the average juror is presumably not familiar. The first prong of the Miller test, therefore, becomes a nullity.

This distortion of the Miller test permits the prosecution to obtain a conviction without proving an essential element of the crime--namely,

the actual obscenity of the material--and thereby denies petitioner her right to due process as guaranteed by the Fourteenth Amendment. The court in United States v. Klaw, 350 F.2d 155 (2nd Cir. 1965) addressed these due process concerns and stressed the importance of expert evidence in this context. The court explained:

> "Due process of law" would be a meaningless cliche if the nonsensical trash that is the subject of this prosecution were allowed to be the basis of a conviction by judge or jury without any proof demonstrating that it has the proscribed effect on any of our citizenry... Having in mind the alternatives of jail or freedom, courts must be aware of the facts of the "held-not-to-be-obscene" or "approved" cases, and ensure that the proof is sufficient to allow a fact finder to set this case apart from them. Otherwise it would be altogether too easy for any prosecutor

> to stand before a jury, display the exhibits involved, and merely ask in summation: "Would you want your son or daughter to see or read this stuff?" A conviction in every instance would be virtually assured.

Id., at 170.

Since Paris Adult Theatre, lower courts have exhibited confusion about the need for expert testimony when materials which are the subject of the prosecution depict deviant sexual activity. The court in Connecticut v. Magee, 32 Conn. Supp. 639, 353 A. 2d 184 (1975), noted:

> Of course, in an obscenity case involving materials bizarre in content, where the appeal may be directed to the prurient interest of a sexually deviant group, such testimony may be helpful and even necessary.

353 A. 2d at 189. While in contrast, the Court of Appeals for the Fifth Circuit stated:

> We find without merit the argument that despite [the principle of Paris Adult Theatre], expert testimony should have been required

> of the Government in the case sub judice because the materials are of a bizarre nature and involve deviant sexual conduct which is not within the common knowledge or full understanding of the average person, or which would not or could not appeal to the average person.

United States v. Hill, 500 F. 2d 733, 740 (5th Cir. 1974), cert. denied, 420 U.S. 952 (1975)(emphasis added). And on other occasions, courts have simply left it to the trial court without further guidance to decide whether expert testimony should be required on that issue. See United States v. Palladino, 490 F. 2d 499, 503 (1st Cir. 1974), on remand, 413 U.S. 916.[3/]

[3/] The following courts have voiced approval of the practice of requiring expert testimony when the materials contain sexual activity of a "bizarre nature": United States v. Klaw, 350 F.2d 155, 170 (2nd Cir. 1965); State v. Childs, 447 P.2d 304 (Oregon, 1968)(en banc); Dunn v. Maryland St. Bd. of Censors, 240 Md. 249, 213 A.2d 751 (1965); Wisconsin v. Simpson, 56 Wis. 2d 27, 201 N.W. 2d 558 (1972); Olsen v. Doerfler, 14 Mich. App. 425, 165 N.W. 2d 648 (1968). But see, New York v. G.I. Distributors, 20 N.Y.2d 104, 228 N.E. 2d 787 (1967) (in which the New York court affirmed an obscenity conviction for materials geared to deviant sexual groups without evidence of appeal to the group's prurient interest)(Chief Justice Field, dissenting). See also, William E. Brigman, The Controversial Role of the Expert in Obscenity Litigation, 7 Cap. U.L. Rev. 519 (1978) which notes the need for expert testimony in the area of deviant literature.

Thus, the evidence required to support conviction for dissemination of materials palpably geared to sexually deviant groups varies among courts. In some courtrooms such as that in the case at bar, juries are left to speculate on the basis of their everyday experience whether a film, book or magazine depicting bizarre and deviant activities might appeal to those with aberrant sexual interests. while others, adopting a more sensible approach, require testimony by an individual knowledgeable in the subject to appraise the material's appeal to the relevant deviant group.

It is evident that trial courts are in need of guidance on the matter of when expert testimony is required to prove the obscene nature of a film, book or magazine. To date, the courts have attempted to draw lines with little or no success. This case presents a prime opportunity for this

Court to clarify the need for expert testimony in obscenity prosecutions involving materials depicting sexually deviant activities and to establish guidelines for determining its use in assuring that due process standards are met.

For these reasons, petitioner respectfully requests that this Court grant her petition for a writ of certiorari.

II. AN IMPORTANT QUESTION IS PRESENTED AS TO WHETHER THE CRIMINAL OBSCENITY ORDINANCES OF THE CITY OF TALLMADGE, OHIO, ARE UNCONSTITUTIONAL UNDER THE FIRST AND FOURTEENTH AMENDMENTS BECAUSE OF OVERBREADTH OR VAGUENESS.

A. The Overbreadth And Vagueness Of The Tallmadge Obscenity Ordinance As Written.

In its landmark decision in Miller v. California, 413 U.S. 15 (1973), this Court defined the limitations imposed by the First and Fourteenth Amendments upon the power of the states to proscribe obscenity. This Court held:

> [W]e confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way and which, taken as a whole, do not have serious literary, artistic, political or scientific value.

Id., at 24 (footnote and citations omitted). It is against these guidelines which the City of Tallmadge ordinances must be measured to evaluate their validity.

As the Sixth Circuit noted in its opinion below, the Tallmadge ordinances are almost identical to the Ohio criminal obscenity statutes, §§2907.31 and 2907.01, Ohio Revised Code.[4/] Tallmadge Ordinance §76.11 makes it a crime to disseminate obscene materials while Tallmadge Ordinance §76.1 defines obscenity. That statutory definition, in relevant part, is as follows:

> Section 76.1--Definitions
>
> As used in sections 76.1 to 76.99 of the Tallmadge City Code of Ordinances:
>
> (A) 'Sexual Conduct' means vaginal intercourse between a male and female, and anal intercourse, fellatio, and cunnilingus between persons regardless of sex. Penetration,

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4/ Sections 2907.32 and 2907.01, Ohio Revised Code, are set forth in the appendix at pp. 161-166. Petition for Writs of Certiorari attacking the constitutionality of the Ohio obscenity statutes are presently pending before this Court in Sovereign News Co. v. Falke, Docket No. 81-2326 and Turoso v. The Cleveland Municipal Court, Docket No. 81-2266.

however slight, is sufficient to complete vaginal or anal intercourse.

(B) "Sexual Contact" means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if such person is a female, a breast, for the purpose of sexually arousing or gratifying either person.

(C) "Sexual Activity" means sexual conduct or sexual contact, or both.

* * *

(F) When considered as a whole, applying local community standards, and judged with reference to ordinary adults, or, if it is designed for sexual deviates or other specially susceptible group, judged with reference to that group, any material or performance is "obscene" if the following apply:

(1) Its dominant appeal is to prurient interest; and

(2) Its dominant tendency is to arouse lust by displaying or depicting sexual activity, masturbation, sexual excitement, or nudity in a way which tends to represent human beings as mere objects of sexual appetite; or

(3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality; or

(4) Its dominant tendency is to appeal to scatological interest by displaying or depicting human bodily functions of elimination in a way which inspires disgust or revulsion in persons with ordinary sensibilities, without serving any genuine scientific, educational, sociological, moral, or artistic purpose; and

(5) When taken as a whole, it lacks serious literary, artistic, political or scientific value.

(G) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(H) "Nudity" means the showing, representation, or depiction of human male or female genitals, pubic area, or buttocks with less than a full, opaque covering, or of a female breast with less than a full, opaque covering of any portion thereof below the top of the nipple, or of covered male genitals in a discernibly turgid state.

The observation by the Sixth Circuit Court of Appeals was in accord with the Ohio

Court of Appeals and the federal district court, each of which noted the close similarity between the Tallmadge obscenity ordinances and the Ohio obscenity statutes (App. 43, 49) and thereafter, relied upon the Ohio Supreme Court's interpretation of the Ohio statutes in evaluating the Tallmadge ordinances. Because of the reliance of the courts below upon the judicial construction of the similar Ohio statutes, interpretations of the Ohio statutes are therefore relevant in assessing the constitutionality of the Tallmadge ordinances.[5/]

The first occasion on which a federal court measured the definition of obscenity embodied in the Ohio statutes against the standards enunciated in Miller occurred when the district court issued

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5/ It is important to note that the Tallmadge ordinances themselves have never been judicially construed by the Supreme Court of Ohio.

the first of two opinions in Sovereign News Co. v. Falke, 448 F. Supp. 306 (N.D. Ohio 1977)("Sovereign I"), remanded, 610 F. 2d 428 (6th Cir. 1979), cert. denied, 447 U.S. 923 (1980), opinion on remand issued Sept. 19, 1980 (N.D. Ohio) ("Sovereign II"), reversed, 674 F. 2d 484 (6th Cir. 1982). On that occasion, District Judge John M. Manos issued a declaratory judgment finding Ohio Revised Code §§2907.01 and 2907.32 unconstitutional. In the course of a scholarly and extensive opinion, he found those statutes to be unconstitutional due to their substantial overbreadth and vagueness and upon a determination that they were not susceptible to an authoritative construction by the state courts that would cure their constitutional infirmities.[6/]

[6/] While an appeal from the decision was pending in the Sixth Circuit, the Ohio Supreme Court decided State v. Burgun, 56 Ohio St. 2d 354 (1978). In that case, the Ohio Supreme Court, while implicitly conceding that Ohio Revised Code §2907.01 is unconstitutional as written,

The district court enumerated the statute's constitutional infirmities:

> Section 2907.01(F)(3)[to which §76.1(F)(3) corresponds] unconstitutionally restricts the display or depiction of extreme or bizarre violence, cruelty or brutality. It is an express holding of Miller that only material depicting or describing sexual conduct may be barred as being obscene. See, Miller v. California, supra, 413 U.S. at 24, 93 S.Ct. 2607. Therefore, the restrictions placed on the description or depiction of extreme violence unconstitutionally restrains free expression, and the statute is therefore overbroad.

6/ (cont.)
nevertheless upheld its constitutionality on the theory that the statute could be saved if the three-pronged Miller test for obscenity were merely added to the end of the statutory language by judicial interpretation. The Sixth Circuit then remanded Sovereign v. Falke to the district court for further consideration of the constitutionality of Ohio's obscenity law in light of the Burgun decision (610 F.2d 428). Upon further consideration, District Judge Manos, in another extensive opinion, again found Ohio's obscenity law, even as interpreted in Burgun, to be unconstitutional due to overbreadth and vagueness. His decision was subsequently reversed by the Sixth Circuit, Sovereign News Co. v. Falke, 674 F.2d 484 (6th Cir. 1982). A petition for writ of certiorari is presently pending before this Court for review, Docket No. 81-2326. See also, Turoso v. The Cleveland Municipal Court, 674 F.2d 486 (6th Cir. 1982), Docket No. 81-2266.

> ...Section 2907.01(F)(1)(2)(3) and (5) [to which §76.1 (F)(1)(2)(3) and (5) correspond] unconstitutionally restrict the display and description of nonactive sexual conduct. For example, simple nudity, such as the showing of a female breast or a male buttocks, may be considered obscene under §2907.01(F). A sexual depiction of that kind is not hardcore pornography, and cannot be restricted as being obscene....Therefore, the court finds §2907.01(F)(1)(2)(3) and (5) are overbroad in that they restrict non-hardcore sexual conduct.

The same constitutional infirmities noted by the district court in Sovereign News are present in the Tallmadge ordinances.

B. The Overbreadth And Vagueness Of The Tallmadge City Ordinance As Judicially Construed.

The courts below adopted the analysis of State v. Burgun, 56 Ohio St. 2d 554 (1978), which purported to rectify the constitutional deficiencies in Ohio's obscenity statute via judicial interpretation. The courts thereby claimed to

have cured the vagueness and overbreadth of the statute (App. 52, 99). However, the adoption of the Burgun decision failed to narrow or clarify the overbroad and vague language of the Tallmadge ordinance.

The Ohio Supreme Court in Burgun reached the conclusion that it could uphold the state statute by merely appending the three-pronged Miller test to the statute. District Judge Manos analyzed the effect of this judicial addition to the statutory definition of obscenity in his second opinion in Sovereign News Co. v. Falke, at pp. 12-13:

> In Burgun, the Ohio Supreme Court left the language of Revised Code §2907.01 intact. Instead, it attempted to remedy the statute by merely tacking onto it the three-pronged Miller formula, the second prong of which requires either the state legislature or the state courts to define with specificity what kinds of sexual depictions may be found obscene. The Ohio

> Supreme Court declined to specify what kinds of sexual depictions may be found obscene, however, and left the language of Revised Code §2907.01 completely intact to serve that purpose. The result is that the Ohio Supreme Court created a circular definition of obscenity which always leads to and depends upon the language employed in Revised Code §2907.01 itself.

As the district court noted in Sovereign News II, the Burgun decision altogether failed to reform the Ohio obscenity statute to meet constitutional standards. Similarly, the reasoning of Burgun also completely failed to eliminate the vagueness and overbreadth of the Tallmadge ordinance.

The instant case presents a vastly different scenario than that reviewed and approved by this Court in Ward v. Illinois, 431 U.S. 767 (1977). In Ward, this Court sustained the constitutionality of Illinois' criminal obscenity statute which, unlike the Tallmadge ordinance, was phrased in

simple but general language upon which it was easy to place a limiting judicial gloss that could be harmonized with the actual wording of the statute.[7] This Court upheld the Illinois statute because it had been given an authoritative construction by the state's highest court which not only incorporated into it the Miller guidelines, but also incorporated into it the explanatory examples given in Miller of the kinds of sexual depictions which can validly be regulated under the second prong of the Miller guidelines.

Three important distinctions exist between the curative judicial interpretation in Ward and the alleged curative interpretation of Burgun as applied to Tallmadge City Ordinance §76.1. See,

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[7] The Illinois statute defined obscenity as follows:

> A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters.

Sovereign II, at 16-19. First, unlike the Illinois Supreme Court, the Ohio Supreme Court has affirmed a number of cases which did not involve the patently offensive sexual activity given as an example of prohibited conduct in Miller. See, e.g., State ex rel. Keating v. Vixen, 35 Ohio St. 2d 215 (1973). Secondly, the Tallmadge ordinance defines obscenity in detailed terms which cannot be reconciled with the Miller examples and therefore, cannot be judicially reformed like the Illinois statute. And lastly, the jury instructions given in the three cases which Burgun affirmed did not incorporate the Miller examples into the definition of obscenity read to the jury. On the basis of these facts, it can only be concluded that Burgun did not remedy the overbreadth and vagueness problems of the Ohio obscenity statute, nor that of the Tallmadge ordinance.

In reviewing the constitutionality of the Ohio obscenity statute, the Sixth Circuit in Turoso v. The Cleveland Municipal Court, 674 F. 2d 486 (6th Cir. 1982)(the decision to which the Sixth Circuit panel deferred in the case at bar), focused on the isolated definition of §2907.01(A) which defines sexual conduct. Finding that sexual conduct conformed with the definitional examples supplied by this Court in Miller, the court held the statute not to be unconstitutionally overbroad or vague.

By pursuing this analysis, however, the court ignored the fact that the statutory definition of obscenity is contained, for the most part, in subsection (F) of that statute. Subsection (A), the section on which the court placed great emphasis as a narrow definition of offensive sexual activity, comprises only a portion of the obscenity definition under both the Ohio statute and the Tallmadge ordinance. The

actual definition of obscenity contained in the ordinance is, in fact, far broader and therefore, the specific definition in subsection (A) in no way acts to remedy the ordinance's overbreadth deficiencies.

An examination of the ordinance demonstrates these overbreadth problems. The Tallmadge ordinance censors depictions of nudity, defined so broadly as to include the showing of any portion of a female breast "below the top of the nipple" and the showing of a male or female buttock with "less than a full opaque covering." See Tallmadge City Code of Ordinances §76.1(H). The ordinance still defines as obscene the depiction of "sexual contact," which in turn includes a depiction of a man touching a woman's thigh. See Tallmadge City Code of Ordinances §76.1 (B) and (C). The ordinance still outlaws depictions of extreme or bizarre violence, cruelty and brutality. Tallmadge City

Code of Ordinances §76.1(B)(5). And the ordinance still censors expression whose "dominant appeal is to prurient interest," without specifying the kinds of sexual conduct the description or depiction of which is prohibited by the phraseology.

The Sixth Circuit decision to uphold the Tallmadge obscenity ordinance will have a far-reaching effect on the law of obscenity throughout the nation. The Sixth Circuit has expanded Ward in a way never intended by this Court. It has taken an ordinance whose actual language is at war with Miller and upheld it, not, as Ward permits, because the state's highest court had by judicial construction affirmatively removed or limited those actual words of an analogous statute which render it facially overbroad and vague, but rather, despite the refusal of the state's highest court to do so. In the name of Ward, it has taken an ordinance

whose language directly conflicts with Miller and, in sustaining it, has required nothing more than the bare assertion by the state's highest court that the language can peacefully co-exist side by side with the Miller test without any reconciliation of the conflicts between the two.

This important decision by a federal court of appeals has breathed new life into the very kinds of broadbased statutes and ordinances outlawing speech which Miller was fashioned to eradicate and Ward did not intend to revive. It represents an open invitation to state legislatures and city councils to enact criminal obscenity laws which broadly stifle protected expression and holds out the promise to them that these laws will withstand constitutional attack so long as the Miller guidelines are inserted as a footnote to the statutory language by judicial construction.

This Court should grant certiorari to avert the unlawful suppression of free speech and clearly draw the permissible boundaries of state and local regulation.

CONCLUSION

For all of the foregoing reasons, petitioner urges this Court to grant her petition for a writ of certiorari.

Respectfully submitted,

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